Bauba Corp. #2, d/b/a Delano Hotel *and* Hotel, Motel, Restaurant & Hi-Rise Employees & Bartenders Local Union No. 355, AFL-CIO. Case 12-CA-9297

September 21, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On March 31, 1982, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and counsel for the General Counsel filed an answering brief to Respondent's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order,[4] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Bauba Corp. #2, d/b/a Delano Hotel, Miami Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the words "recognize and" after the phrase "Failing and refusing to" in paragraph 1(b).

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Upon request by the Union, recognize and bargain in good faith with the Union, as the collective-bargaining representative of the employees in the following appropriate unit:

> "All employees in housekeeping; food and beverage, including cashiers and checkers; front service; telephone communications; maintenance and engineering; and laundry, but excluding all the front office cashiers and other clerical employees, executives, department heads, managerial employees, guards and supervisors as defined by the Act."

3. Substitute the following for new paragraph 2(c):

"(c) Give retroactive effect to the terms and conditions of employment of said contract, and make its employees in the above-described bargaining unit whole, with interest, for any loss of pay or other employment benefits which they may have suffered by reason of Respondent's failure to sign and implement the aforesaid agreement in the manner set forth in *Ogle Protection Service, Inc., and James L. Ogle, an Individual*, 183 NLRB 682 (1970), and *Florida Steel Corporation*, 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962))."

4. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides were represented and presented evidence, it has been found that we have violated the National Labor Relations Act, as amended, in certain respects. To correct and to remedy these violations, we have been directed to take certain actions and to post this notice.

WE WILL NOT fail or refuse to execute the collective-bargaining agreement agreed upon between us and the Union.

WE WILL NOT fail or refuse to recognize and bargain with the Union.

WE WILL NOT unilaterally cease making payments on behalf of our unit employees into

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent contends that the parties did not reach a contract on July 11, 1980, asserting that a condition precedent to the contract had not been met; i.e., having the contract checked by Respondent's attorney. Although the Union concedes that Respondent informed the Union prior to July 11 that it wanted to have the contract checked by its attorney, we note that, based on credited testimony, Respondent "about July 11" informed the Union that the contract was signed and could be picked up. Accordingly, it is clear that if a condition precedent to the contract existed it had been met.

[3] We hereby amend the Administrative Law Judge's Conclusion of Law 5 to conform more closely to the violations found: "By refusing to sign the collective-bargaining agreement agreed upon between Respondent and the Union and by failing and refusing to recognize and bargain with the Union, Respondent has violated Section 8(a)(5) and (1) of the Act."

[4] We shall modify the Administrative Law Judge's recommended Order to conform more closely to the violations found.

the Union's pension and health and welfare funds, fail to grant wage increases due our employees under the collective-bargaining agreement, or fail or refuse to process and discuss grievances filed by our employees.

WE WILL NOT unilaterally institute changes in working conditions, such as the methods of employee evaluations, rates of pay, or other terms and conditions of employment, and WE WILL NOT unilaterally institute new health insurance programs.

WE WILL NOT fail or refuse to check off union dues pursuant to dues-checkoff authorizations and to remit such dues to the Union under the checkoff provisions of our collective-bargaining agreement.

WE WILL NOT in any like or related manner refuse to bargain collectively with the representative of our employees and thereby interfere with, restrain, and coerce our employees with respect to their rights protected by Section 7 of the Act.

WE WILL, upon request by the Union, forthwith execute the contract upon which agreement was reached between us and the Union.

WE WILL, upon request by the Union, recognize and bargain in good faith with the Union as the collective-bargaining representative of our employees in the following appropriate unit:

> All employees in housekeeping; food and beverage, including cashiers and checkers; front service; telephone communications; maintenance and engineering; and laundry, but excluding all the front office cashiers and other clerical employees, executives, department heads, managerial employees, guards and supervisors as defined by the Act.

WE WILL give retroactive effect to the terms and conditions of employment of the said contract and make our employees in the above-described bargaining unit whole, with interest, for any losses they may have suffered by reason of our failure to sign and implement the aforesaid agreement.

WE WILL pay all contributions to the Union's pension and health and welfare funds, as provided for in the collective-bargaining agreement, which have not been paid and which would have been paid absent our unlawful discontinuance of such payments.

WE WILL, upon request, process grievances filed under the collective-bargaining agreement.

WE WILL honor the contract's checkoff provisions and the valid dues-checkoff authorizations filed with us, and remit to the Union dues we should have checked off pursuant to the collective-bargaining agreement between us and the Union, with interest.

BAUBA CORP. #2, D/B/A DELANO HOTEL

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This proceeding was heard in Coral Gables, Florida, on April 13 and 15 and June 11, 1981. Upon a charge filed and served on August 11, 1980, by Hotel, Motel, Restaurant & Hi-Rise Employees & Bartenders Local Union No. 355, AFL-CIO, herein called the Union, the Regional Director for Region 12 issued a complaint alleging that Bauba Corp. #2, d/b/a Delano Hotel, herein called Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. Respondent duly filed an answer denying the commission of unfair labor practices.

The issues raised by the pleadings are whether Respondent had executed, in July 1980, a collective-bargaining agreement, and thereafter repudiated it, or, assuming Respondent had not executed such agreement, whether it refused to sign a written agreement after having agreed in bargaining to the terms of a contract; whether Respondent violated Section 8(a)(5) of the Act by unilaterally changing working conditions without notice or bargaining with the Union; and whether Respondent violated the Act by refusing to recognize the Union.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel submitted a brief which has been carefully considered. On the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Florida corporation with a principal office and place of business in Miami Beach, Florida, is engaged in the operation of a hotel. During the 12 months preceding the issuance of the complaint, Respondent received gross revenues in excess of $500,000, and purchased and received at its Miami Beach, Florida, location goods and materials valued in excess of $50,000 which were shipped directly from points located outside the State of Florida.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The three Mehrpouyan brothers, Cyrus, Sohrab, and Koroush, are equal stockholders of Respondent. According to Cyrus, the vice president, he was the one who dealt with the Union since he is most familiar with the English language among the brothers. Respondent acquired the hotel in 1978, and at that time the employees were represented by the Union under a contract which was due to expire on July 15, 1980. There is no question that Respondent assumed the contract and carried out its terms. Indeed at the hearing, Respondent amended its answer so as to admit that since the purchase by Respondent of the hotel in or about September 1978, it assumed the terms of the collective-bargaining agreement then in effect, and since that time until July 15, 1980, Respondent recognized the Union as the collective-bargaining representative of the employees in the unit described in the complaint.[1]

Respondent further stipulated that subsequent to July 15 it has not complied with any agreement. In addition Respondent stated on the record that, sometime in July or August 1980, it obtained insurance coverage, not through the Union, for employees who were working in the unit described above. Respondent has also conceded that since July 25, 1980, it has not recognized any grievances, nor has it made any payments to insurance funds or pension funds of the Union, nor deducted dues from any employees.

B. *Facts*

The testimony adduced at the hearing is mainly concerned with the negotiations between the Union and Respondent. The business agent who was in charge of negotiating a contract in 1980 was Lazaro Martinez who said that he first spoke to Cyrus in the last week of May. He met in the hotel with Cyrus, a Mrs. Hollister, the housekeeper, and Roger Lee-Benner, another union business agent. He gave Mehr two forms of contract proposals, one being the hotel association contract, and the other the independent contract, telling Cyrus he could choose whichever he wanted. Their discussions revolved around three contract provisions which Cyrus wanted removed completely. One of them was the discharge clause relating to the discharge of employees, another was jury duty, and a third clause which provided for 3 days off in the event of death of a close relative. Another meeting was held at the end of May attended by the same people during which further discussions were had concerning the three clauses referred to as well as rates of pay. The principal contradiction in the testimony concerning these meetings is with regard to the presence of the two brothers with Cyrus at these meetings. The three brothers all testified that they were present at the first two meetings in the hotel with Martinez and Lee-Benner. The latter two, the union representatives, denied that the two brothers Sohrab and Koroush were at these meetings. I found Lee-Benner, particularly, to be a very credible witness based on his demeanor, and in addition the fact that it appeared at the hearing that he was respected by all parties involved. He was at the two meetings in May, and not at any meetings in June because of illness. He categorically stated that the two brothers did not accompany Cyrus at these meetings. Moreover it appears that, in his affidavit, Cyrus did not say his brothers were with him. Perhaps more important is the testimony of both Lee-Benner and Martinez, contrary to Cyrus, that the latter did not say or indicate at any of these two meetings that an agreement had to be approved by his brothers. The housekeeper, Hollister, who had been present at the meetings, did not testify. As indicated, I credit the testimony of Martinez and Lee-Benner that such a statement was not made by Cyrus at the time.

Several meetings were held during June and early July, one of which was attended by the president of the Union, Tony Fernandez who told Cyrus that it was necessary to get a contract signed. During these meetings Martinez and Cyrus discussed wage rates which Cyrus wanted to decrease. However, Martinez told him that while he could not permit Respondent to have wage rates less than those of other hotels, Cyrus could delay the effective date of the wage increases provided in the contract proposals for 2 or 3 months, but this would be a side oral agreement.

Finally, during a meeting at the end of June or early July, according to Martinez, he met Cyrus and discussed various changes that had been proposed by Cyrus. At this meeting, Cyrus agreed to the contract subject to an understanding that the wage increases would not go into effect for 3 months after the commencement of the contract on July 15, 1980. Martinez testified that he telephoned Cyrus on July 11 and said he needed a signed contract, at which time Cyrus told him he had already signed and Martinez could pick it up at the hotel. Martinez stated he went to the hotel and saw a secretary who gave him a manila envelope. Upon returning to his office he noticed that the contract was signed by Cyrus on the wrong page. He then called Cyrus telling him he needed the contract signed as soon as possible but Cyrus said he would be out of town and Martinez should see him in a few days. Martinez then saw Cyrus at the hotel on July 17, bringing with him an unsigned contract and the one which had been signed on the wrong page. He gave both to Cyrus who asked him to come back in a half hour and the other copy would be signed. Martinez returned with an organizer for the Union, Gonzalez, and Cyrus gave him an envelope. When Martinez returned to the office he saw a signature on the contract as follows: "Cyrus Mehr."

[1] It is stipulated the following employees of Respondent constitute a unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Housekeeping, food and beverage including cashiers and checkers; front service, telephone communications; maintenance and engineering; and laundry; but excluding all the front office cashiers and other clerical employees, executives, department heads, managerial employees, guards and supervisors as defined by the Act.

Thereafter Lee-Benner, who was the business agent in charge of Respondent's unit, called Cyrus on July 22 to inquire about the checks for fringe benefits and dues. Cyrus asked Lee-Benner to bring the contract to the hotel because he wanted to look at it and have his brothers sign it, since he himself was going to be involved with the management of the Eden Roc Hotel after August 1. According to Lee-Benner, at this point Cyrus said nothing to him about there not being any contract, or that he had not signed it, or that he was not going to make any deductions for dues or pay benefits, or that there was no contract until his brothers signed. Lee-Benner reported this call to Fernandez and they both went to the hotel the following day and met Cyrus in the lobby. Cyrus looked at the contract and said it was only a copy. Fernandez replied that the original had been sent to the International. Then Cyrus said they should leave it with him, he would have his brothers sign the contract and they will be able to pick it up the next day. Fernandez replied he would come the day after because the following day there was to be an election at the Eden Roc Hotel. Cyrus agreed and Fernandez left while Lee-Benner went with Cyrus to the office where he was given two checks in settlement of a grievance.

Lee-Benner stated that he called Cyrus on July 25 and asked for the list of fringe benefit payments and checkoff and also whether the contract was ready with his brothers' signatures. Cyrus said they have no contract, that it was not his signature on it, and that he did not recognize the Union. He further said he did not want to get involved in another arbitration case, presumably referring to the Garcia grievance, and that he found them burdensome and bothersome.

That afternoon Lee-Benner went to the hotel with the Union Vice President Menditto, but was unable to see Cyrus. However they did see Koroush and asked him about the checks. Koroush replied that they had no contract with him. Then Menditto asked what about the checks for the dues and fringe benefits. At first Koroush said yes but then said, "[W]e will supply insurance for people ourselves." Later that day Lee-Benner returned to Respondent with Gonzalez, an organizer, but Cyrus was not in. However the following morning he came again with Gonzalez and saw Cyrus who told him he had a petition from quite a few of the workers stating they did not want the Union. Cyrus had a list with names on it but did not give Lee-Benner a copy. He also had a list ready and checks for the dues checkoff but refused to give it to Lee-Benner because he was only going to pay for half the month as the contract expired on July 15. He also withheld any payments for the fringe benefits. Lee-Benner explained the periods of time for which the fringe benefits were due, and then left but without any checks. Lee-Benner had no further contact with Cyrus.

Cyrus was, of course, the principal witness for Respondent. At first he stated that, at the initial meeting with the Union, his brothers were present. At another point, apparently recognizing that Lee-Benner had testified his brothers were not present, Cyrus stated that his brothers could have been present during other meetings. In any case I have found, as set forth above, that the two brothers were not present at the two initial meetings with Cyrus. For this and other reasons I do not find the testimony of Cyrus to be credible except with respect to the alleged signature on the proposed contract, received in evidence as the General Counsel's Exhibit 8, which Cyrus testified was not his signature. Despite the fact that he does on occasion sign his name "Cyrus Mehr" rather than using his full name, nevertheless the samples of his signatures received in evidence do not appear to match the one on the General Counsel's Exhibit 8. As to other matters involved in negotiations, Cyrus, in response to obviously leading questions, testified that there was no final understanding with the Union as to the hourly rate or the right to discharge. The problem with the acceptance of such testimony is that, even assuming it was not his signature on the contract, he does not deny the other events detailed by Martinez and Lee-Benner. Thus there is no explanation, nor indeed a denial, that there was transmitted to the Union on two different occasions manila envelopes which Martinez and Lee-Benner testified contained contracts, one having been signed on the wrong page, and the second one was the General Counsel's Exhibit 8 discussed above. Nor is there any denial of the visits made by various union agents, subsequent to the negotiations with respect to their efforts to obtain signatures on the document. Nor is there any denial that Lee-Benner visited Cyrus, at the latter's request, so that the two brother's signatures could be obtained. Nor did Cyrus deny that he had requested this for the reason that he personally was going to be concerned with the operation of the Eden Roc Hotel, a matter in which the Union certainly had an interest since it appears that a representation election was being conducted at the time of the events detailed above.

In the end Cyrus himself conceded that the main stumbling block was the provisions concerning discharge of employees. As to the pay rates, I find, based on a synthesis of the credited evidence, that Respondent had agreed to the rate structure as proposed in the General Counsel's Exhibit 8, with a side oral agreement that the increased rates would not go into effect on July 15, but rather on October 15. With respect to the discharge provisions to which Cyrus was objecting, it must be pointed out that the contract provided that the employer had the right to discharge employees for just cause. So while Cyrus stated that he objected to the discharge provision, his testimony makes clear that it was the arbitration provisions with which he had a problem. It was apparent that Cyrus objected to the time, effort, and cost that any arbitration would create for him.

In any case, I find based on the credited evidence of Martinez that agreement was reached in the latter part of June or early in July, after Martinez had convinced Cyrus with regard to the discharge and arbitration provisions and others with which Cyrus had objection. Martinez conceded that Cyrus stated at that time that he merely wanted to check the agreement with his attorney. It must again be pointed out that during this last session or at any of the prior meetings there is no evidence that Cyrus stated or indicated that any agreement reached by

him had to be approved and signed by his two brothers. Thereafter, on or about July 11, Martinez called Cyrus who told him the contract had been signed and he could pick it up at the hotel. There followed the events related above.

C. *Discussion and Analysis*

The General Counsel does not contend or allege that Respondent is failing to abide by an executed contract. Although there has been testimony on the matter, it is quite clear as found above that the signature on the document in evidence which purports to be that of Cyrus is not his signature, nor does the General Counsel contend that it is. However, it is equally clear that the document was delivered to the Union and Respondent must bear some responsibility for it.

The principal issue, therefore, is whether the parties reached an agreement which Respondent thereafter refused to execute. Preliminarily, the Union has admittedly been recognized as the exclusive bargaining representative in an agreed-upon appropriate unit, and Respondent carried out the terms of the collective-bargaining agreement which ran until July 15, 1980. Respondent raised some question as to whether Cyrus was aurhorized to act as its sole representative for purposes of bargaining. The record reveals and I have found that he was the only officer of Respondent who engaged in negotiations with the union representatives, many of the meetings were conducted without the presence of his brothers, and that they apparently had no part in those meetings which they did attend. Moreover, there is no evidence, even from Cyrus, that he had informed the union representatives he was not authorized or empowered to negotiate an agreement, nor had he informed them that any agreement reached would require the signatures of all the brothers.

From the time that agreement was reached on or about July 11 until July 25, at which time Cyrus said that there was no agreement and disavowed his signature on the contract, Cyrus had a number of communications with the union representatives including Lee-Benner on the telephone on July 22, and he did not state there was no contract or even that he had not signed a contract. In all the circumstances, I find that agreement had been reached on July 11, which Respondent, by Cyrus, repudiated on July 25, and by such conduct Respondent violated Section 8(a)(5) of the Act.[2]

The credited and uncontradicted testimony of Lee-Benner is to the effect that on July 25 when he called Cyrus to ask him for the list of fringe benefits and checkoffs, and whether he had the contract ready with his brothers' signatures, and that Cyrus told him that there was no contract, that he did not recognize the Union, and that his signature was not on it. Cyrus further said that he did not want to get involved in another arbitration case, that these cases were burdensome and bothersome. In his own testimony Cyrus said he would no longer take any grievances and told his employees that there was no longer a union at the hotel. This conduct, apart from whether Respondent had an obligation to sign an existing agreement, constitutes a repudiation of the obligation to recognize and bargain with the Union, and is in and of itself a violation of Section 8(a)(1) and (5) of the Act.[3] In this connection it is noted that Respondent failed to rebut the presumption of the Union's continuing majority after the termination of the contract.[4] Nor are expressions from employees, as testified by Cyrus, that the only reason they belong to the Union was to have the insurance and if they could get that, they did not need the Union, sufficient to rebut or overcome the presumption.[5]

Respondent also violated Section 8(a)(5) of the Act by instituting and unilaterally changing working conditions. In his testimony, Cyrus admitted that he started a new insurance plan without talking to the Union about it. In addition, he said that he told employees that they would be evaluated, and they would have to shape up or ship out. In this regard, he said to employees that they would receive the same pay as they had under the old contract and would be individually evaluated and get raises if they deserved them. It is well settled that an employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in the existing terms and conditions of employment.[6] However, if parties have bargained in good faith to an impasse, then an employer may institute unilateral changes in terms and conditions of employment, so long as they are not substantially different or greater than any which the employer has proposed during the negotiations.[7] Clearly in this case no impasse was reached and, moreover, Respondent unlawfully withdrew recognition from the Union. In such circumstances, Respondent violated Section 8(a)(5) of the Act by instituting the unilateral changes in working conditions as described above.

Thereafter Respondent further violated Section 8(a)(5) by admittedly stopping payments to the Union's health and welfare funds. It is well settled that health, welfare, pension, and annuity funds, which are part of an expired contract, constitute an aspect of employee wages and a term and condition of employment which survives a contract. This is so even if it had been found that the parties had not reached agreement on the terms of a new contract.[8]

Finally, Respondent has admitted that upon the expiration of the contract on July 15, 1980, it thereafter ceased to deduct dues pursuant to checkoff authorizations filed by employees. As I have found that Respondent has violated Section 8(a)(5) by its failure to execute an agreed-upon contract, such contract being effective July 16, 1980, the obligation to check off dues continues under the terms of the old contract as carried forward in the new agreement. The Board has held that an employer's failure to deduct and remit dues is an unlawful interference under Section 8(a)(1) of the Act, a violation of the

[2] *Trojan Steel Corporation*, 222 NLRB 478 (1976).

[3] *Seacrest Convalescent Hospital*, 230 NLRB 23 (1977).

[4] *The Saloon, Inc.*, 247 NLRB 1105 (1980).

[5] *Terrell Machine Company*, 173 NLRB 1480, 1482 (1969).

[6] *N.L.R.B. v. Benne Katz, Alfred Finkel, and Murray Katz, d/b/a Williamsburgh Steel Product Company*, 369 U.S. 736 (1962).

[7] *N.L.R.B. v. Crompton-Highand Mills, Inc.*, 337 U.S. 217 (1949).

[8] *Henry Cauthorne, an Individual, t/a Cauthorne Trucking*, 256 NLRB 721 (1981); *Paramount Potato Chip Company, Inc.*, 252 NLRB 794 (1980).

employer's bargaining duty under Section 8(a)(5) and, additionally, a unilateral change of the terms and conditions of employment in violation of Section 8(a)(5) of the Act.[9]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Housekeeping; food and beverage, including cashiers and checkers; front service, telephone communications; maintenance and engineering; and laundry; but excluding all the front office cashiers and other clerical employees, executives, department heads, managerial employees, guards and supervisors as defined by the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.
5. By refusing to sign the collective-bargaining agreement, agreed upon between Respondent and the Union, Respondent has violated Section 8(a)(5) and (1) of the Act.
6. By unilaterally ceasing making payments on behalf of unit employees into the Union's pension and health and welfare funds, by instituting new programs of health insurance and evaluations of employees for wage increases, and by failing and refusing to process grievances, Respondent has violated Section 8(a)(5) and (1) of the Act.
7. By failing and refusing to check off union dues pursuant to valid checkoff authorizations and remitting the same to the Union in accordance with the collective-bargaining agreement in effect between the parties, commencing July 16, 1980, Respondent violated Section 8(a)(1) and (5) of the Act.
8. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent violated its obligation under the Act by refusing to sign a contract embodying the terms of the agreement reached between Respondent and the Union, I shall also recommend that Respondent be ordered on request to sign such an agreement, to comply retroactively to its effective date with its terms, and to make whole the employees for losses, if any, which they may have suffered by Respondent's refusal to sign such an agreement in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 51 (1977).[10] In this regard, Respondent should not be responsible for wage increases provided in agreement commencing July 16, because it had been orally agreed that payment of such wage increases be deferred for a period of 3 months from the commencement of the contract.

I shall also recommend that Respondent be ordered to remit dues owed to the Union by Respondent because of its unlawful refusal to check off dues subsequent to July 15, 1980, and that such payments be made with interest.[11]

As Respondent unlawfully ceased making contributions to the union pension, health, and welfare funds, I shall recommend that it be ordered to pay all such contributions to these funds, as provided for in the collective-bargaining agreement, which were not paid as a result of Respondent's unlawful discontinuance of such payments. In addition, Respondent should be ordered to compensate the funds for administration costs and other expenses incurred by the funds as a result of its acceptance of retroactive payments. *Turnbull Enterprises, Inc.*, 259 NLRB 934 (1982). The determination of the amount due with regard to contributions to the fund and costs and other expenses are left to further compliance proceedings.[12]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[13]

The Respondent, Bauba Corp. #2, d/b/a Delano Hotel, Miami Beach, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to execute the collective-bargaining agreement agreed by Respondent and the Union.

(b) Failing and refusing to bargain collectively with Hotel, Motel, Restaurant & Hi-Rise Employees & Bartenders Local Union No. 355, AFL-CIO, as the exclu-

[9] *Shen-Mar Food Products, Inc.*, 221 NLRB 1329 (1976), enfd. in pertinent part 557 F.2d 396 (4th Cir. 1977).

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[11] *Shen-Mar Food Products, Inc., supra.*

[12] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as a part of a "make whole" remedy. Therefore, I leave to further proceedings, the question of how much interest Respondent must pay into the benefit funds in order to satisfy the "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents which may show what losses are directly attributable to the unlawful action. These may include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, 1216 at fn. 7 (1979), *Turnbull Enterprises, Inc., supra.*

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

sive representative of its employees in the following appropriate unit: Housekeeping; food and beverage, including cashiers and checkers; front service; telephone communications; maintenance and engineering, and laundry employees; but excluding all the front office cashiers and other clerical employees, executives, department heads, managerial employees, guards and supervisors as defined in the Act by:

(1) Unilaterally instituting changes in working conditions such as methods of employee evaluations, rates of pay, and other terms and conditions of employment.

(2) Refusing to process and discuss employee grievances.

(3) Unilaterally ceasing to make payments on behalf of unit employees into the Union's pension, health, and welfare funds, and unilaterally instituting new health insurance programs.

(4) Unilaterally ceasing to honor checkoff provisions and valid dues-checkoff authorizations and failing to remit dues to the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request by the Union, forthwith execute the contract upon which agreement was reached with the Union.

(b) Give retroactive affect to the terms and conditions of employment of said contract and make whole its employees for losses they may have suffered by reason of Respondent's failure to sign the agreement in the manner set forth in The Remedy section herein.

(c) Pay all contributions to the Union's pension, health, and welfare funds as provided for in the collective-bargaining agreement which have not been paid and which would have been paid absent Respondent's unlawful discontinuance of such payments.

(d) Honor the contract checkoff provisions and remit to the Union dues it should have checked off pursuant to the agreed-upon collective-bargaining agreement together with interest.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to finalize the amount of backpay which may be due under the terms of this recommended Order.

(f) Post at its Miami Beach facility copies of the attached notice marked "Appendix."[14] Copies of said notice on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."